

**MONTGOMERY COUNTY, MARYLAND
COMMISSION ON COMMON OWNERSHIP COMMUNITIES**

Robert A. Zich,
Complainant

v.

Case No. **47-07**
June 5, 2008

Decoverly I Homeowners Association,
Respondent

DECISION AND ORDER

The above-captioned case came before the Hearing Panel of the Montgomery County Commission on Common Ownership Communities (the "Commission") for review and decision pursuant to Chapter 10B of the Montgomery County Code (2004, as amended). The Hearing Panel has considered the evidence of record, and finds, determines, and orders as follows:

Procedural Background

On September 6, 2007, Robert Zich ("Zich" or the "Complainant") filed a dispute with the Commission alleging that the Decoverly I Homeowners Association ("Decoverly" or the "Respondent") had violated the "open meetings" provisions of the Maryland Homeowners Association Act (Section 11B-111 of the Real Property Article of the Maryland Code) by closing the meetings of the board of directors in order to discuss litigation between Decoverly and two of its members when the only other person present with the board was Decoverly's property manager. He also claimed that the Decoverly board improperly closed a meeting to discuss a complaint about another member's violation of the architectural rules. Finally, Zich alleged that Decoverly failed properly to report on its closed meeting in its minutes of the board meeting.

Decoverly responded to these allegations on October 4, 2007, agreeing essentially with the facts as alleged by Zich but defending the decisions to close the meetings as proper.

Zich refused mediation of the dispute. The case was then presented to the Commission, which on January 9, 2008, accepted jurisdiction of the dispute and assigned it to this Hearing Panel for disposition. The Hearing Panel, *sua sponte*, determined that the dispute could be resolved by summary judgment without a hearing since there

appeared to be no real dispute over the relevant facts. The hearing panel ordered the parties to submit briefs on the facts and on the law for the Hearing Panel to review and it also allowed the parties to engage in discovery. Both parties did submit briefs and Zich submitted additional evidence in support of his claims. The Hearing Panel has reviewed all the documents and exhibits submitted by the parties.

Findings of Fact

1. The Respondent, Decoverly I Homeowners Association, Inc., is a homeowners association within the meaning of the Maryland Homeowners Association Act, whose Articles of Incorporation, Declaration of Covenants & Restrictions, and By-laws are filed in the land records of Montgomery County, Maryland.

2. The Complainant is a resident of, and the owner of a lot within, the Decoverly I Homeowners Association and the lot is subject to all the rules of that community.

3. On July 16, 2007 and on August 20, 2007, the Board of Directors of Decoverly held its regular monthly meetings. At each meeting the Board went into executive (closed) session to discuss a dispute between Decoverly and one of its members that was pending with the Commission. On July 16, 2007, the Board discussed Commission Case #31-06, *Cunningham & Fisher v. Decoverly I Homeowners Association*, in which the Commission issued a Decision and Order on March 6, 2007, finding the homeowners in violation of the architectural rules and ordering them to make certain repairs. On August 20, 2007, the Board discussed a separate dispute pending with the Commission in which the Board had made a settlement proposal to the homeowners. In both closed meetings the Board also discussed claims that other homeowners were in violation of the architectural rules, although no litigation in those other disputes was pending or contemplated at the time.

4. Both parties agreed that during each of the two closed meetings referred to above, the only persons present were the members of the Board and the property manager. No attorney was present.

5. The minutes of the Board meetings and executive sessions for July 16, 2007, and August 20, 2007, as subsequently approved by the Board, do not state the vote of each board member on the motion to close the meeting or the legal authority under which the Board closed the meeting. They do state the substance of the matters discussed, however.

6. Counsel for Decoverly in his response to the Hearing Panel's Prehearing Order, advanced an additional ground for closing the two meetings, which was that in addition to discussing the two disputes pending before the Commission the Board also discussed outstanding delinquencies in the payments of assessments. However, this matter does not appear in the minutes of the closed meetings, is not substantiated by any witness statement in the record, and there are no details concerning those discussions.

7. Counsel for Decoverly also conceded that Decoverly has not complied with the requirements of Section 11B-111(5)(ii) of the Maryland Homeowners Association Act in that it had not properly reported the closings of the meetings in its minutes of those closed meetings.

Conclusions of Law

The chief legal issue presented in this dispute is whether the right to close meetings of a board of directors to discuss actual or potential litigation with its property manager is granted by Section 11B-111(4) of the Maryland Homeowner Association Act, which states in pertinent part:

(4) A meeting of the board or directors or other governing body of the homeowners association or a committee of the homeowners association may be held in closed session only for the following purposes:

- (i). . .
- (ii). . .
- (iii) Consultation with legal counsel;
- (iv) Consultation with staff personnel, consultants, attorneys, or other persons in connection with pending or potential litigation.

Proceedings before the Commission are governed by Chapter 10B of the Montgomery County Code (2004, as amended), and under Section 10B-13 the decisions of the Commission's hearing panels are final and binding unless appealed to the Circuit Court. Therefore, a dispute filed with the Commission constitutes "litigation" within the meaning of Section 11B-111's open meeting requirements.

The Hearing Panel believes that a property manager employed by a homeowners association is a proper person with whom the board of directors may meet to discuss litigation in closed session. The law clearly differentiates between "legal counsel" and "attorneys" on one hand, and "staff personnel, consultants. . . or other persons" on the other hand. The law does not limit the right to discuss certain legal matters in closed session only with legal counsel. A property manager can constitute "staff personnel," a "consultant," or "other person." A property manager is frequently a professional with extensive experience in the management of community associations. A board may wish to discuss litigation with its property manager for several legitimate reasons—e.g., to review the preparation of its case, to obtain the manager's advice on the probable expenses and time of litigation, the likelihood of success, the alternatives available, etc. The Hearing Panel concludes that the Respondent had the authority to close its meetings for this purpose.

Respondent also advanced an additional ground for closing the meetings, namely, to discuss delinquencies in the payments of assessments. Although counsel for Decoverly has articulated a reasonable argument that discussion of delinquencies might be a compelling reason under Section 11B-111 (4) (viii) to close a meeting, the record does not indicate that the Board members articulated this reason as grounds for closing

the meeting. Therefore, the Panel finds that discussion of delinquencies at the two meetings was beyond the scope of the matters that should have been discussed in the closed sessions.

However, the Hearing Panel also believes that the Respondent erred in closing the meetings to discuss alleged architectural violations when no litigation was pending or contemplated at the time of the meeting. These topics should have been addressed during the open meetings. The existence of an architectural violation—such as trash, an unapproved fence, or a dilapidated home—is not *per se* one of the exemptions listed in Section 11B-111(4). As a matter of policy, the public consideration of an alleged violation can directly affect not only the neighbors who must live next door to it but also those who may wish to make similar changes on their own lots. It can also affect the overall appearance and visual harmony of the entire community, and is therefore a matter of public concern to the whole community. In certain cases the discussion of such alleged violations might be brought under Section 11B-111(4)(viii) or perhaps other subsections, but in reviewing the minutes of the two executive sessions involved, the Hearing Panel sees no compelling reason why the discussion of other, non-litigated, architectural disputes was closed to the members.

The Hearing Panel further finds that the Respondent failed to report properly on the voting to close its meetings and the legal authority for closing its meetings, in violation of Section 11B-111(5).

The Complainant has requested that the Respondent reimburse him the costs of filing this complaint, pursuant to Section 10B-13(d) of the Montgomery County Code. The Panel believes that this request is not justified under that section. The Panel notes that Respondent has not delayed this complaint, that the Respondent has prevailed on one the major issue raised (whether it had the authority to close the two meetings in question to discuss actual or potential litigation with its property manager), and that Complainant rejected a mediation session in which the issues might have been resolved without a hearing.

ORDER

Based on the facts and law as found by this Panel it is hereby ORDERED:

1. That the Respondent shall not close the public meetings of its governing body for the purpose of discussing allegations of violations of its architectural and maintenance rules, except to the limited extent that such a discussion may be protected by one of the specific exemptions of Section 11-B-111(4) of the Real Property Article of the Code of Maryland; and,

2. That the Respondent shall, in all minutes drafted after the date of this Order, include a statement of the time, place, and purpose of any closed or executive meeting, the record of the vote of each board or committee member by which the meeting was closed, and the authority under Section 11B-111 of the Real Property Article of the Code

of Maryland by which the meeting was closed, whenever the meeting covered by the minutes included a closed or executive session;

3. That the Respondent shall, within 45 days from the date of this Order, distribute a copy of this Order to every member of the Association in the same manner that it normally uses to notify its members of other Association business; and

4. That Complainant's request for reimbursement of the \$50 filing fee be denied.

Commissioners Negro and Maloney concur.

Any party aggrieved by this Decision and Order may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within 30 days from the date of this Decision and Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

Christopher Hitchens, Panel Chair
June 5, 2008